La Mousse, Inc. *and* **Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO.** Cases 31-CA-9367, 31-CA-9680, and 31-RC-4550

October 20. 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 23, 1981, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and a supporting brief, and the General Counsel also filed a brief in response to Respondent exceptions, and Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, La Mousse, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(e):

"(e) Post at its Los Angeles plant copies of the attached notice marked 'Appendix.'[28] Copies of said notice, which shall be in Spanish and English, on forms provided by the Regional Director for Region 31, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: This case was heard in Los Angeles, California, on various dates between May 6 and July 2, 1980. The charge in Case 31-CA-9367 was filed on September 6, 1979,[1] and a complaint thereon issued on November 29. On January 15, 1980, the Regional Director for Region 31 issued a "Report on Challenges and Objections, Order consolidating cases, Order Directing Hearing and Notice of Hearing," wherein Cases 31-CA-9367 and 31-RC-4550 were consolidated for hearing. On January 7, 1980, the charge in Case 31-CA-9680 was filed, and on February 29, 1980, an order consolidating all three cases for hearing was issued. The objections to the election allege conduct substantially similar to certain conduct alleged as unfair labor practices in the consolidated complaint. A resolution of the 8(a)(3) allegations will also dispose of the challenged ballots. Respondent denies it engaged in conduct alleged to be unlawful and objectionable.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Extensive briefs were filed by Respondent and the General Counsel, and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

La Mousse, Inc., herein called Respondent, is a California corporation engaged in the manufacture and sale of pastries. Its gross revenue exceeds $500,000 per year, and it annually purchases and receives goods and services valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers received such goods in substantially the same form directly from outside the State of California. In accordance with Section 102.20 of the Board's Rules and Regulations, and Respondent's admission, it is found that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[1] All dates herein are in 1979 unless stated otherwise.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In affirming the Administrative Law Judge's conclusion that Respondent did not violate the Act by discharging Supervisor Berta Ujueta, we rely solely on the reason that her termination was only for lawful cause rather than for unlawful discriminatory cause. In addition, we note that the Administrative Law Judge's Conclusion of Law 7 failed to state that Respondent violated Sec. 8(a)(5) of the Act, as well as Sec. 8(a)(1), by its January 1, 1980, unilateral grant of group health insurance benefits.

[3] Member Fanning would make the bargaining order prospective in nature. See his concurring opinions in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company*, 228 NLRB 93 (1977), and *Hambre Hombre Enterprises, Inc., d/b/a Panchito's*, 228 NLRB 136 (1977). The General Counsel has excepted to the Administrative Law Judge's inadvertent failure to include in his recommended Order a requirement that the notices be posted in Spanish as well as in English. We agree with the General Counsel and we shall modify the recommended Order accordingly.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The consolidated complaint alleges in substance:

(1) That following the designation of the Union as Respondent's employees' collective-bargaining representative, Respondent constructively discharged 12 of its undocumented alien employees by making arrangements with the United States Immigration and Naturalization Service, herein called INS, to conduct a raid of Respondent's facility approximately 2 days prior to a Board-conducted representation election and which resulted in the deportation of said employees, because of their union or protected concerted activities, thereby violating Section 8(a)(3) of the Act.

(2) That Respondent has failed to reinstate three of said employees to their former positions of employment in violation of Section 8(a)(3).

(3) That Respondent unlawfully discharged Berta Ujueta in violation of Section 8(a)(3).

(4) That Respondent granted its employees morning and afternoon breaks in order to discourage support for the Union in violation of Section 8(a)(3).

(5) That Respondent subsequently recalled Refugio Betancourt to a position different from his former job and thereafter discharged him, all because of his union or protected concerted activities.

(6) That Nadine Korman, Respondent's president, violated Section 8(a)(1) by telling employees she would never accept the Union and that if they engaged in a strike they would lose their jobs.

(7) That Respondent's agent Fierro unlawfully interrogated an employee about her union interests.

(8) That Respondent's agents, Ramirez and Fierro, interrogated employees about their union activities, solicited their grievances, promised to grant benefits to employees, and threatened unspecified reprisals against an employee, all for the purpose of discouraging their union activities.

(9) That Respondent, through Korman and Ramirez, unlawfully promised Berta Ujueta benefits to discourage her support for the Union, asked her to report on the union sympathies and desires of other employees, and advised her of the futility of selecting the Union by stating Respondent would never have a union.

(10) That in November and December, Respondent violated Section 8(a)(1) by unilaterally changing the length of morning and afternoon breaks, arranging for medical insurance, instituting three rules governing working conditions, and requiring that employees keep a record of certain work produced and began timing its employees engaged in such work.

(11) That in January 1980, Respondent discharged three employees for failing to comply with one of the rules governing working conditions that had been unilaterally instituted.

The General Counsel seeks the usual reinstatement and restitution of backpay remedy, together with a bargaining order. As noted earlier, the objections to the election alleged conduct substantially similar to some of the unfair labor practice allegations. A resolution of the 8(a)(3) allegations will also dispose of the challenged ballot issue.

Contending that Berta Ujueta was a supervisor within the meaning of the Act, played the leading role in organizing the employees, and solicited their signatures on the Union's authorization cards, Respondent denies that the Union at any time represented an uncoerced majority of its employees. While acknowledging that law firm which previously represented it was responsible for the INS raid, Respondent points out that Korman attempted unsuccessfully to countermand arrangements for the raid and notified Respondent's employees not to report for work on the morning of the expected raid, but that the Union encouraged them to report for work. Therefore, Respondent argues, the Union substantially contributed to the discharges of employees resulting from the raid and therefore a bargaining order would allow the Union to benefit from its own misconduct and would not effectuate the policies of the Act. Respondent denies specifically and generally all other allegations in the complaint, and moves to dismiss the complaint on the ground the Union fraudulently induced it into agreeing to an election.[2]

Thus, the principal issues to be resolved are:

1. Whether Berta Ujueta was a supervisor within the meaning of the Act and whether her termination was unlawful.

2. Whether the role Berta Ujueta played in the Union's organizing drive tainted the authorization cards so that the Union never obtained an uncoerced majority.

3. Whether Respondent's conduct warrants setting aside the election and a bargaining order.

4. Whether Betancourt was properly reinstated and whether his subsequent discharge was unlawful.

5. Whether the discharge of Arauz, Badillo, and Aguirre was unlawful.

6. Whether the complaint should be dismissed on the ground that the Union fraudulently induced Respondent into entering into an agreement for an election.

Credibility, as in all cases of this type, is, of course, a material issue. The transcript reveals considerable testimonial conflict. In particular, there was considerable

[2] At the conclusion of the General Counsel's case, Respondent moved to dismiss certain complaint allegations. I granted the motion with respect to pars. 18(d) and 20(d). Par. 18(d) alleges that Respondent violated Section 8(a)(1) by promising employees higher wages in order to discourage their support for the Union. The General Counsel acknowledged she had not presented any evidence in support of this allegation. Accordingly, I reaffirm the dismissal of par. 18(d). I have reconsidered the evidence and arguments with respect to par. 20(d) which alleges that Respondent violated Sec. 8(a)(1) by unilaterally requiring its employees to keep records of the number of "leaves" they made, and by timing the employees while they made said "leaves." The evidence shows conclusively that Respondent was engaged in conducting a cost analysis and timestudy for the purpose of developing a price quotation on a special mousse for Continental Airlines. In view of the valid business justification for the study, its limited duration, and the fact that Rosen specifically stated on the record that the Union did not have a "problem" with a timestudy, I reaffirm my prior ruling dismissing par. 20(d).

conflict with respect to whether Berta Ujueta, herein called Berta, was really vested with supervisory authority; whether Berta threatened Nadine Korman, which was the motivating factor in her termination; whether both the Spanish and English versions of the notice of election were posted; whether unlawful statements were made by Korman during a speech which was read to employees; and whether Refugio Betancourt was recalled in January to a position substantially equivalent to the job he occupied prior to August 29. In making my credibility findings, I have given consideration to the demeanor of the witnesses while they were on the stand, their ability to recall past events, the various positions occupied by the witnesses and their possible interest in the outcome of the litigation, the inherent probabilities in the accounts which they gave, and the weight of the evidence. The testimony of Berta and others of the General Counsel's witnesses consistently sought to portray Berta as lacking any authority in the kitchen. As will be seen hereafter, Respondent's witnesses, including former employees who have no interest in the proceedings, contradicted their testimony. The General Counsel's picture of Respondent's managerial organization is at variance with sound practice, and in my view the testimony of her witnesses in this regard lacked the ring of truth. If they were to be believed, I would have to find that the 16-plus kitchen employees worked without supervision virtually all of the time. For reasons which will appear hereafter, I am convinced that the General Counsel's witnesses had in some way been apprised of the impact that finding that Berta was a supervisor might have on the proceedings, and tailored their testimony accordingly. I am equally convinced they tailored their testimony regarding the posting of the election notices, which will be more fully explained below. Thus, while I do credit the General Counsel's witnesses in many respects, I do not credit their testimony in those particular areas. To the extent I credit a witness only in part, I do so upon the evidentiary rule that it is not uncommon "to believe some and not all of the witness' testimony." *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950).

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Nadine Korman commenced making desserts commercially in the kitchen of her home in 1972. Berta was her first employee. Prior to moving in 1974 to a building on Third Street in Los Angeles, another kitchen employee was hired. The business appears to have prospered on Third Street, more employees were hired, and on March 17, 1979, the operation moved to La Grange Street, where, in addition to Berta, approximately 16 kitchen employees, 2 drivers, and a bookkeeper worked. From sometime in 1975 until December 1977, Korman's mother, Sylvia Lee, also worked at the Third Street location taking orders and selling products at the retail counter which was located in the front of the building. The kitchen, where of course the kitchen employees worked, was located in the rear portion of the building. In or about December 1977, Respondent opened a retail store on Westwood Boulevard in Los Angeles, some distance from the La Grange operation. Lee has worked at that location since its opening. Except for eating lunch sometimes in the kitchen area with the kitchen employees prior to the opening of the Westwood Boulevard retail store, Lee, who speaks fluent Spanish, spent no time in the kitchen production area. Mary Lou Minnillo, no longer employed by Respondent, was the bookkeeper and "sort of office manager" at both the Third Street and La Grange facilities. She occupied a desk in the front office at both locations, where, in addition to doing the bookkeeping, she answered the phone, solicited phone orders from restaurants, typed the orders, and arranged for their delivery. Other than passing through the kitchen to the restroom facilities, Minnillo spent no time in the kitchen. Either she or Korman prepared a list of orders for the following day which was posted on the bulletin board each evening so the kitchen personnel would know what types of desserts were required for the following day. Korman testified that in her absence, which was often and sometimes protracted, Berta had always been in charge of the kitchen and Minnillo in charge of the office. Both Korman and Berta testified that in 1978, while still at the Third Street location, Korman told Berta that she was a supervisor and she was not to wash dishes anymore.

Interest in the Union arose in February or March 1979. Delivery man Mike Garai called the Union and gave Berta's name, address, and phone number to the union representative. Rosen, the Union's secretary-treasurer and business agent, contacted Berta who in turn invited the production employees to a meeting at the union hall on April 13. As Respondent's kitchen employees all speak Spanish, Rosen had another individual present to translate what he had to say into Spanish.[3] Rosen's translator, however, apparently was not too good, and it fell upon Berta, who was fluent in both Spanish and English, to help out in the translations. While there is some dispute as to what Rosen told the employees regarding the purpose of the authorization cards which were passed out, the crucial cards are clear in that they designate, in both English and Spanish, the Union "to act as my exclusive bargaining agent for purposes of collective bargaining." Approximately 2 weeks later, on April 25, Berta handed out a second set of cards to the employees, telling them that they had to sign them because the word "tobacco" had not been included in the Union's name on the first set of cards. While Berta denied that she was present when any of the employees signed the second set of cards, the credited testimony shows that she handed them out in the "closet" or "dressing room" to individual employees and that some signed them in her presence.[4]

On July 3, the Union filed a petition for an election in Case 31-RC-4550. It is undisputed that Korman's first knowledge of organizing efforts was the receipt of a copy of the petition from the Board a couple of days later. After receiving a copy, Korman hired attorneys

[3] Obviously, Rosen does not speak Spanish.

[4] Of the nine second set of cards in evidence, seven, including one signed by Berta, are dated April 25, one April 26, and one April 27.

Ross Arbiter and Paul Gordon of the Los Angeles firm Gordon, Weinberg & Gordon to represent Respondent in the representation case. A hearing on the R case petition was scheduled for July 30. On that date, the Union and Respondent executed a Stipulation for Certification Upon Consent Election, in the following unit:

> All full and part-time hourly production employees employed by the employer at its location [at] 11150 La Grange Avenue, Los Angeles, California, excluded all delivery employees, office clerical employees, guards, and supervisors including Berta Alicia Ujueta.

The Board agent scheduled to conduct the representation hearing recommended approval of the agreement on July 30, the day it was executed by the parties, and the Regional Director approved it on the same day. On August 7, Rosen, who had executed the agreement on behalf of the Union, wrote to the Regional Director as follows:

> Dear Mr. Goubeaux:
>
> I am questioning the decision made by one of your deputys [sic] Mr. Bryant, regarding the placing of a specific name rather than a position on La Mousse, Inc., case 31-RC-4550.
>
> In my opinion the placing of the name, Berta Alicia Ujueta, constitutes a violation of the NLRB Act, and I am questioning the legality of Mr. Bryants [sic] action in insisting that, that specific name be deleted.
>
> Please inform me if I am correct as to this matter.
>
> Sincerely, James Rosen
> Secretary-Treasurer

A copy of the letter was not sent to Respondent, nor was Respondent aware of the letter until it was produced by the General Counsel during rebuttal herein. The Regional Director's response is not a part of the record.

During August, Korman gave a speech to the kitchen employees, and consultants hired by Respondent's attorneys spoke to various employees. Alleged statements and queries are alleged as violations of Section 8(a)(1) and objectionable election conduct.

About a week prior to the election scheduled for August 31, attorney Arbiter made arrangements with INS to conduct a survey of Respondent's employees for illegal aliens. While Korman appears to have expressed some reservations about followihg this course, nothing was done to impede the forthcoming INS raid. Instead, she called Berta the evening of August 28, told her she had received an anonymous tip that INS would be in the area the following day, and that Berta should call the other employees and tell them not to come to work. While Korman did not know for a fact that a substantial number of the kitchen employees were illegal aliens—and as a consequence they would be deported—she suspected they were. After talking to Korman, Berta went to the union hall and talked to Rosen. Yolanda Martinez and Gloria Lopez were already there. Rosen apparently told them that he did not think INS was going to come, but he thought that someone was coming to check some records and that Korman did not want the employees there so that they could be interviewed. After talking to Rosen, Berta returned home and called those employees she had not yet contacted, telling them both Korman's message and Rosen's reaction.

The following morning, August 29, all but two of the kitchen employees reported for work at 6 a.m., the usual starting time. Maria Zepeda and Lubia Gutierrez were both pregnant and did not report for work that morning. At approximately 7:30 a.m., INS agents arrived and conducted a survey and determined that 10 employees were illegal aliens. All 10 returned voluntarily to their native countries, to Mexico and 1 to Guatemala.[5] At the behest of Respondent's then attorney, all 10 employees taken away by INS agents, and the 2 women that had not reported for work that morning, were terminated. Berta was also terminated under circumstances to be discussed hereafter.

On August 31, Berta and several of the employees that had accepted voluntary deportation on August 29, but that had reentered the country illegally, appeared at Respondent's premises and were permitted to vote in the representation election under challenge. The report on challenges and objections recites that the tally of ballots showed that of approximately 5 eligible voters, 10 cast ballots, of which none were for the petitioning union, 2 were against the Union, and 8 were challenged. Adelina De La Cruz, Raquel Gonzales, and Luis Olivas, all challenged by the Petitioner on the ground they were supervisors, have been determined by the Regional Director to be eligible voters. Ana Veronica Gutierrez, Ana Elsa Reyes Rodriguez, Ofelia Vasquez, Arcelia Rodriguez, and Berta were challenged by the Board agent conducting the election because their names did not appear on the eligibility list prepared by Respondent. All five had been terminated on August 29. My conclusions with respect to their eligibility appears hereafter.

There is no dispute that following Berta's termination, Gloria Lopez was made the kitchen supervisor and that she possessed supervisory authority.

On September 6, the charge in Case 31-CA-9367, and on November 29 the complaint and notice of hearing in that case issued. In December, Respondent offered reinstatement to most of the discharged employees, including Betancourt who was again discharged within a few days. His recall and termination will be discussed later.

Effective January 1, 1980, Respondent, without prior notice to the Union, instituted a health insurance plan for the employees. In December, Respondent changed the length of the morning and afternoon breaks for employees, and on December 29, read to employees, and posted on the bulletin board, Respondent's policies regarding the "disturbing or touching another person's personal property," and the leaving of cooking materials unattended which would subject one to immediate discharge,

[5] Refugio Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Elizabeth Villanueva and Ofelia Vasquez to Mexico, and Yolanda Martinez to Guatemala.

and the failure to call in within 1 hour of the start of the workday if the employee was going to be late or absent, also subjecting one to immediate discharge. Thereafter, Aida Arauz, Mario Badillo, and Demazo Aguirre were terminated for failure to comply with the call-in policy. The unilateral change in the length of the breaks, the institution of the rules, and the termination of three individuals for violation of the rules, are alleged as violations of Section 8(a)(1). The charge in Case 31-CA-9680 covering those alleged infractions was filed on January 7, 1980, and the consolidated amended complaint covering these and the other alleged discriminatees, issued February 29, 1980.

The allegations in the consolidated complaint are not in chronological order. Insofar as is possible, I have attempted to treat the allegations chronologically.

B. *The Question of Berta Ujueta's Supervisory Status*

As noted at the outset, the General Counsel's witnesses consistently sought to portray Berta as lacking any authority, claiming that until Gloria Lopez was made supervisor after Berta's August 29 termination, either no one was in charge of or supervised the kitchen employees, or "all of us" were in charge. It is interesting to note, however, that when several of the General Counsel's witnesses were asked if Berta had testified truthfully at a state unemployment compensation hearing that ". . . I used to train people, new people, and check that the work was done right, and I run the place until she [Korman] got there because they open at 6 in the morning, and she [Korman] gets there usually at 9:00 o'clock or so," they admitted she had.[6]

I am persuaded on the totality of the record that Berta functioned as Respondent's kitchen supervisor within the meaning of the statutory definition of Section 2(11) of the Act. Thus, the record shows that while Berta did indeed work alongside the other kitchen employees, she also possessed authority over them. While it is abundantly clear on the record that from time to time Korman told some of the employees that more kitchen help was needed and asked them if they had friends whom they could bring in, the record is equally clear that Berta effectively recommended the hiring of Gloria Lopez, Eva Sanchez, Maria Skelson, Sissy Ujueta (her sister-in-law), Raquel Huerta, and that numerous other friends and relatives brought in by other employees were put to work right away while Berta "run the place" prior to Korman's arrival. Berta was also instrumental in the hiring of her husband, Luis Ujueta. Berta, the most senior of all the employees, was paid $5.50 per hour prior to her discharge, a dollar more than the next two highest paid employees, Ana Elsa Rodriguez and Ofelia Vasquez. The rest of the kitchen employees earned varying amounts from the minimum of $2.90 to $4.50 per hour. While Korman testified she also rewarded Berta with substantial cash Christmas bonuses, $800 in 1978, $500 in 1977, and lesser quantities from 1973 through 1976, bonuses to other employees varied from $10 to $20 for new employees to $200 for Luis Ujueta, Berta's husband. Korman also rewarded Berta with gifts of jewelry costing approximately $300, or triple the cost of gifts given to any of the other employees. She also rewarded Berta with a variety of other gifts. The record shows that Korman relied on Berta's evaluations of employees in either granting or denying raises, and that she terminated employees upon receiving negative reports on employees from Berta. In neither situation did Korman make an independent investigation, instead relying solely on Berta's evaluations. According to Korman, she told Berta as early as 1974 that she was in charge of the kitchen, and in 1978, that she was a supervisor and should not be washing dishes. Berta acknowledged she had been told on two occasions not to wash dishes, and in 1978 that Korman told her she was a supervisor.[7] The record shows that Korman was away on numerous occasions varying from a few days to a month. While the General Counsel's witnesses claim that no one was left in charge of the kitchen on these occasions, the weight of the evidenoe and sound business practice convinces me otherwise. There is no evidence that Minnillo, the bookkeeper, possessed any authority over employees, and Berta testified that Minnillo had no experience in the kitchen. Thus, Berta's subsequent testimony that she took problems brought to her by the kitchen employees to Minnillo is not credited. There is ample testimony that, despite some of the testimony of the General Counsel's witnesses to the contrary, Berta assigned work, oversaw the making of the desserts, inspected the work and required employees to redo defective work, told them what time to come in,[8] and told them when they could have their lunch breaks; that they called her when they were going to be late or miss work; and that she was in charge of the inventory. For a period of time she also either kept or checked the timecards, and on one occasion reported to Korman the fact that an employee had falsified a timecard. Korman terminated an independent cleaning crew at Berta's request. Berta proposed that Korman pay her $120 per week for the cleaning, and that she would in turn pay the kitchen employees for doing it. Accordingly, Korman paid her $120 per week and Berta made up the cleaning lists, rotated employees on the lists, and on occasion asked Korman to type them. Lilia Garcia, one of the General Counsel's witnesses, acknowledged that if something bad happened in the kitchen, they told Berta, and that Berta made decisions such as to throw products away. When Korman was gone and problems arose, they asked Berta, who made the decisions. There was also testimony by Miream Gutierrez, which was unrefuted and which I credit, that on an occasion when Berta was on a maternity leave, the kitchen employees called her at home when problems arose. Gutierrez, who voluntarily left Respondent's employ in June 1978, testified credibly that Berta was in charge of the kitchen, directed every-

[6] Raquel Gonzales, no longer employed by Respondent, identified Berta as her supervisor, testified everyone knew she was a supervisor and that it was not until "the last days in which they were with the Union" that the employees said she was not a supervisor.

[7] Acknowledging that in July 1979 she was training Eva De La Cruz to be a supervisor, she denied she herself was a supervisor.

[8] The usual reporting time was 6 a.m. However, there were occasions when employees came in at 3, 4, and 5 a.m. Korman's usual reporting time was 9 a.m.

one and told them what to do.[9] Berta was the one to whom they took their problems and who would direct them to redo their work if it was done wrong. In Berta's absence, Ofelia Vasquez or Lilia Garcia would tell them to redo their defective work. Eva Sanchez, an employee and neighbor of Berta's, testified she asked Berta for a job, and was put to work by Berta before Korman arrived. When she wanted to leave early, she notified Berta who responded right away whether or not she could leave. Before she started to work, Berta told Sanchez that she, Berta, was in charge of the kitchen. Sanchez testified that Berta was in charge whether or not Korman was present, and that Korman never told her what to do in the kitchen. It is clear that all employees in the kitchen respected Berta and considered her as their link to management, and that management considered her the boss of the kitchen. In sum, contrary to the General Counsel, I conclude, based on all the evidence, that Berta was a supervisor exercising independent judgment, as defined in section 2(11) of the Act. Accordingly, her inclusion in the bargaining unit would be contrary to Federal Labor policy.

C. *The Authorization Cards*

Eleven employees signed authorization cards on April 13, Refugio Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Gloria Lopez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, and Maria Zepeda.[10] The parties stipulated that, in addition to the foregoing, Lubia Gutierrez, Eva Rodriguez, and Eva Sanchez were employed during the period June 28 to July 11, which encompasses the date the representation petition was filed by the Union. Thus, if the April 13 cards were valid, the Union had authorization cards for 11 of 14 unit employees. As noted earlier, Berta was instrumental in establishing initial contact with the Union, in arranging employee meetings with the union representatives, and acted in the role of an interpreter at the April 13 meeting. She also solicited the signatures to a second set of cards from most of the same employees between April 25 and 27. Respondent contends that since Berta was a supervisor, her role in the organizing drive tainted the authorization cards so that the Union never obtained an uncoerced majority in the bargaining unit. The General Counsel contends that even if Berta is a supervisor, her participation in obtaining the cards is insufficient to invalidate them.[11]

The evidence indicates that Berta's union activity in early April when the first set of authorization cards was signed, was limited to informing the kitchen employees of the first union meeting, to expressing her opinion that the Union would be good for the employees, to translating Rosen's remarks from English to Spanish, and to responding to employees' questions regarding the Union and the authorization cards. Her involvement with the late April cards was to pass out the cards to employees and to tell them that the new cards were needed because the name of the Union was not complete on the first set. In this regard, it is noted that the second set of cards was passed out secretly, indicating to employees in any event that Respondent did not favor the union, which it indeed did not. The record is void of any evidence which could have misled the employees into believing that Respondent favored the Union, or that they were induced to designate the Union through fear of supervisory retaliation. The courts and Board have long recognized that mild supervisory involvement in organizational activity is not sufficient to undermine the validity of a union's card majority. Rather, there must be a showing of supervisory participation calculated to exert substantial pressure directly on those who sign. As the Fifth Circuit stated in *N.L.R.B.* v. *WKRG-TV, Inc.*, 470 F.2d 1302, 1315, 1316 (1973):

> It is actual pressure and coercion we are seeking to avoid by our rule disallowing cards tainted by supervisory influence. A mechanical rule that requires a finding of supervisory solicitation in situations . . . where there is no hint of intimidation, is too broad.
>
> Before the Board invalidates a card because of prounion supervisory solicitation, there must be some showing that the signing employee was subject to a reasonable apprehension that his failure to sign could have adverse consequences. . . .
>
> There must be a more substantial exhibition of pressure than a passing remark or statement of prounion conviction. So long as nothing in the words, deeds, or atmosphere of the alleged "solicitation" contains the seeds of potential reprisal, punishment, or intimidation, the involvement of the supervisors does not rise to the levels of supervisory "solicitation" . . . .

[9] Mike Garai, a driver who had been terminated by Respondent in April and who testified on behalf of the General Counsel, testified that Berta was in charge of the kitchen.

[10] The April 13 cards of Ana Elsa Reyes Rodriguez, Refugio Betancourt, and Gloria Lopez contain their printed names rather than their signatures. Each of the three employees testified that they read the cards before filling them out and that each printed his name thereon. I conclude, therefore, that they are valid designations. In any event, all three signed valid cards again on April 25. Elizabeth Villanueva testified that she read the authorization card containing her name, and asked fellow employee Rosenda Ramirez to fill it out for her. As Ramirez was authorized to sign Villanueva's name, her card is valid. Villanueva too, signed a second valid card on April 25.

[11] The unit alleged to be appropriate at par. 7 of the complaint and the unit described in the Stipulation for Certification Upon Consent Election differ in substance only in that, in the latter, Berta was specifically excluded as a supervisor by name. Respondent contends that the complaint should be dismissed on the ground that the Union fraudulently induced it to agree to an election. Rosen agreed, in the Stipulation for Certification Upon Consent Election, that Berta was to be excluded as a supervisor, intending if the Union won the election, to bargain on her behalf. While the Regional Director approved the election agreement, it is well established that neither the General Counsel nor the Board is bound by positions or stipulations taken by parties in a representation case. See, e.g., *Southern Paint & Waterproofing Co., Inc.*, 230 NLRB 429, 436 (1977). The Board recognizes the fact that parties are sometimes willing to forego the presence of a given employee in the unit or his vote in a tally in order to hold a speedy election. Such action does not, however, preclude relitigation of the issue in a subsequent 8(a)(1) or (3) unfair labor practice proceeding. *Southern Paint, supra; Farms Fans, Inc.*, 174 NLRB 723 (1969); *Stanley Air Tools*, 171 NLRB 388 (1968). Accordingly, no merit is found in Respondent's position.

Thus, the courts have rejected employer challenges to cards based on minor supervisory participation in union activities such as supervisor's signing cards, attending union meetings, transporting employees to meetings and answering questions about the union. *N.L.R.B.* v. *Jerome T. Kane, d/b/a Kane Bag Supply Co.*, 435 F.2d 1203, 1207 (4th Cir. 1970); *Clay City Beverages, Inc.*, 176 NLRB 680, 682 (1969), enfd. 434 F.2d 1315 (6th Cir. 1970); *N.L.R.B.* v. *Ozark Motor Lines*, 403 F.2d 356, 358-359 (8th Cir. 1968); *International Union, UAW* v. *N.L.R.B.*, 363 F.2d 702, 707 (D.C. Cir. 1966), cert. denied 385 U.S. 973. Compare: *N.L.R.B.* v. *Hecks, Inc.*, 386 F.2d 317, 322-323 (4th Cir. 1967), and *Turner's Express, Incorporated* v. *N.L.R.B.*, 456 F.2d 289, 292-293 (4th Cir. 1972). On the basis of the foregoing facts and authorities, contrary to the position of Respondent, I find that the authorization cards are not invalid and that the Union represented a majority of Respondent's employees, 11 out of 14, from and after April 13, and on June 28 as alleged in the complaint.

D. *Alleged Acts of Interference, Coercion, and Restraint*

Paragraph 16 of the consolidated complaint alleges that in the latter part of July, Korman advised employees of the futility of selecting the Union by telling them she would never accept the Union and that if they engaged in a strike they would lose their jobs. The basis for this allegation is a speech that Korman read to employees in English which was translated into Spanish by Lucien Cadji, a friend. Korman, whom I credit, testified that the speech had been dictated by her attorney, and that she made no statements not contained therein. The speech, Respondent's Exhibit 1, reads:

> A. The Union submitted a Petition to a government agency called the N.L.R.B. In that Petition 30% of the employees here said they wanted to have an *election—not* a Union. Therefore, I have cooperated and there is going to be an election where everyone in the kitchen except Berta can vote. The voting will take place on Friday, August 31st at 11:00 a.m. at our shop.
>
> B. What you will be voting for is whether or not you want to be represented by the Union. Even if you signed cards, you do not have to vote in favor of the Union. A "yes" vote means you want the Union to represent you. A "no" vote means that you do not need someone else to represent you.
>
> C. "Representing" means the Union will negotiate on your behalf regarding your working conditions, but *it does not necessarily mean there will be any changes. The only changes will be those I want to make* regardless of the Union and what it wants.
>
> D. I do not think it is good for all of us to have the Union here. I am not for the Union because it will divide us. The Union will only take your money (in monthly dues, initiation fees, and fines) and there are *no guarantees* that the Union will get you anything.
>
> E. I have always kept an open door to all of you. I have always tried to help you resolve problems and I have given you as much as I could. The Union would be an outsider—a third party—who would only interfere with the working relationship we all have. The Union does not care about how comfortable you girls and men are here. What the Union does care about is getting its money. I work with you on an everyday basis, and the Union won't always be around when you need them.
>
> F. The law does not allow me to make any promises to you about the future. The law does not allow me to tell you my plans for the future. I cannot make any promises.
>
> However, the Union can make all the promises it wants—this is because the Union *cannot* make good any of its promises and, unfortunately, the law expects all of you to understand and realize this. I am not allowed to promise you anything, but my past experience with you have always shown concern for you and your families' well-being.
>
> If you still believe in the promises that the Union has made, ask the Union to guarantee those promises in writing. The Union won't be able to do this because it knows that their promises can't be kept.
>
> G. Before you girls and men make up your minds as to whether or not you want the Union, you should understand the problems. Let me list a few for you.
>
> 1. Initiation fees to join the Union.
> 2. Monthly dues.
> 3. Fines for not attending meetings.
> 4. A strike.
>
> H. A *Strike* means you will not be working for the Company. Under some circumstances, the Company may be able to permanently *replace you*, which means you will not have a job here anymore. Under other circumstances, the Company will take you back, but you won't be paid for all the time you are on strike. The Union can tell you to go on strike. That will seriously disrupt your family life. The Company will continue to operate and the Company will have workers replace you if you go out on strike.
>
> I. These are a few of the things I thought you should think about and know. I will be sending you letters for the next few weeks further explaining my thoughts and beliefs.
>
> J. Please discuss the Union and your vote with your family. Your family should also understand the consequences and responsibilities of voting for the Union.
>
> K. I strongly believe that you do not need the Union and that your future is here with me. You do not need to pay someone else to talk to me.
>
> L. Vote No—Vote against the Union—Keep us together.
>
> M. If you have any questions, I will be glad to answer them. However, I will answer them in a letter so that my answers are not misunderstood.

> N. Please understand—I cannot go to your homes like the Union can, but I will keep you advised by meetings and letters.
> Please vote for me.
> Vote against the Union.
> Vote No.

Korman testified that she told Cadji, who speaks seven languages, to translate exactly as written "because that is the law," and that she was not allowed to say anything else. In light of testimony by several of General Counsel's witnesses that additional statements were made, the question is raised whether Cadji made statements not contained in the written text. Cadji was not a witness. Minnillo, who is not bilingual, testified that both Korman and Cadji read from the paper each had. Lilia Garcia, acknowledging on cross-examination that Korman read from the paper, testified on direct examination as follows:

> Well, Nadine spoke and the other person interpreted in Spanish. It was said there about the election, it was going to be the 31 of August, of the union, that the votes were going to be taken the 31st of August at 11:00 o'clock in the morning. That she did not want the union. As a favor she was asking us to vote no for the union, because said union was not good, that it made a lot of promises but did not accomplish them, and until that day we were working well as a family, that if the union would come in it would not be the same, because the union was going to intervene in our persons, and she as a favor was asking us to vote no for the union, because under no motive was she going to accept the union.

Ofelia Vasquez' version was that Korman "said that she was never going to accept the Union, even though we went on strike, that years and years could go by and she was not going to accept it." Further, "Nadine's friend [Cadji] asked if there was someone who had been in a union, and Eva De La Cruz answered and said she had been.[12] She said that unions were not good. They are only good for taking money."

Asked to recite everything that was said at the meeting, Arcelia Rodriguez testified:

> Well, I do not remember what she said, but I do have in mind that Nadine told her friend to tell us that she was not going to accept the Union . . . .[13] She also said that maybe we would not go to strike, but she would not pay us the time that we would lose there, and various things, but I do not remember what.

Berta, fluent in both Spanish and English, was present at the meeting, and testified that:

> Nadine was speaking in English, and this man was translating to Spanish. Nadine said that she wanted for us not to vote for the Union because she didn't want anybody to be—to come in between us. She says we are like a family and she wanted to keep being that way, and she also said that she wouldn't—she couldn't offer us anything, but if we didn't call the Union she could do something for us, but it wasn't a promise, and that is all I remember right now.

After reading over a copy of the speech, Respondent's Exhibit 1, Berta acknowledged that it sounded like what had been said. Thus, Berta failed to corroborate the other witnesses for the General Counsel, and corroborates Korman. In light of Berta's testimony, an adverse inference based on the Respondent's failure to call Cadji as a witness is not warranted. As I credit the testimony of Korman and Berta over that of Lilia Garcia, Ofelia Vasquez, and Arcelia Rodriguez, I conclude that the General Counsel has failed to prove paragraph 16 by a preponderance of the evidence and recommend its dismissal.

Paragraph 17 of the complaint alleges that on or about August 25, Fierro interrogated an employee about her union activities, desires, and sympathies. Berta testified she overheard Fierro, who was speaking to Gloria Lopez and Eva De La Cruz, ask Lopez, "How come we wanted the Union there." Lopez, who appeared as a witness for both the General Counsel and Respondent, neither confirmed nor denied the conversation, and neither De La Cruz nor Fierro testified.

Paragraphs 18(a), (b), and (c) allege that in mid-August Daniel Ramirez and Carmen Fierro, Respondent's agents, unlawfully interrogated employees, solicited their grievances, and promised to grant them benefits in order to discourage support for the Union. While Respondent denied the agency of Fierro and Ramirez, Korman acknowledged that her attorneys at that time had hired the labor consulting firm of Borowski and Brushett, and that she had made Respondent's premises and employees available to Fierro and Ramirez, who were employed by that firm. As they were acting on Respondent's behalf in the union organizing campaign, I find they were Respondent's agents within the meaning of Section 2(13) of the Act. As neither Fierro nor Ramirez testified, the record stands unrefuted that one or the other asked various employees why they wanted the Union, if they had any problems at work; "what it was that we were asking for to ask for the union"; encouraged them to speak directly with Korman in order to obtain the things they wanted, and inferred they (Ramirez and Fierro) would seek raises for employees; asked if it was true they wanted the union, and why they were not happy.[14] The General Counsel has proven paragraphs 17, 18(a), (b) and (c).

Paragraphs 18(e), (f), and (g) appear to be based on a conversation between Berta and Ramirez, and allege unlawful interrogation, a promise to grant benefits in order

[12] Cadji's purported question was not alleged in the consolidated complaint as a violation of the Act, and this is the only witness who testified Cadji asked any questions. Lacking corroboration, I do not credit the testimony in this regard.

[13] Korman neither speaks Spanish, nor does the witness speak or understand English. Accordingly, I do not credit her statement that "Nadine told her friend to tell us that she was not going to accept the Union."

[14] Based on the unrefuted testimony of Berta, Lilia Garcia, Yolanda Martinez, Ofelia Vasquez, and Ana Veronica Gutierrez.

to discourage union support, and a threat of unspecified reprisals if she engaged in activities in support of a union. Berta testified, without contradiction, that Ramirez spoke to her alone; "he said because I was a supervisor," a fact she denied, and asked her if she knew anything about the Union, which she also denied; that he asked why she was unhappy, and after learning why, told her that one of the things about which she complained was going to be fixed. She testified he stated further that if the employees were caught in a union meeting, "that we would be in trouble." Such statements made to an employee would be unlawful. However, as I have found that Berta is a supervisor within the meaning of Section 2(11) of the Act, she cannot be considered a statutory employee legally protected with respect to her exercise of rights which Section 7 of the Act guarantees. Accordingly, I recommend dismissal of paragraphs 18(e), (f), and (g).

Paragraphs 19(a), (b), and (c) are based upon a conversation between Berta, Ramirez, and Korman, and allege a promise to grant benefits to discourage support for the Union, a request that Berta report on other employees' union sympathies and desires, and advising Berta of the futility of selecting the Union by saying that Respondent would never have a union.

According to Berta, during a conversation with Ramirez and Korman that lasted about 45 minutes, Korman made the following statements:

> She said, I don't want the union to come in here, and she says, you can help me because you are a supervisor. . . . So she says, what do you want? She says, I give you one week vacation in October, and I will renew your wages in January, and you will have two weeks vacation anytime you want next year . . . Before I left she says that she didn't want the union in there, and she was going to fight even if it took her 20 years, to fight it . . . She says to ask the girls to vote no for the union, and I said I will try, but they probably wouldn't listen to me . . . And she says, try it anyway, and I left, and about 5 minutes later she called me into the kitchen and told me to talk to the girls and give her an answer by 3 o'clook that afternoon.

Korman testified that she told Berta, "I need your help. There is a campaign to organize the union. You are my supervisor. I want your help"; that Berta responded, "What is a union?"; that she went on to state, "Berta, what is it you want? Do you want more vacation? Do you want more bonus? . . . What is it you want, because I want your help and you're not helping me. . . . Do you want 4 weeks in Guatemala?" She testified: "Because Berta was stipulated my supervisor [in the Stipulation for Certification Upon Consent Election] and because I was told I could talk to her as administrative, I said Berta, I don't want a union." She denied she asked Berta to ask the employees to vote against the Union, contending she was "asking for help" without specifying the nature. Korman impressed me as the more reliable witness and I therefore credit her version over that of Berta. It is specifically found that Korman did not ask Berta to report on other employees' union sympathies and desires as alleged in paragraph 19(b), and I do not credit Berta's testimony that Korman said she would fight the Union if it took 20 years. While Korman's testimony may be susceptible to a finding that she was promising a benefit to Berta in order to enlist her aid in resisting the Union, such conduct would not be unlawful here since it has been found that Berta is a surpervisor within the meaning of Section 2(11) of the Act. I therefore recommend dismissal of paragraphs 19(a), (b), and (c).

Paragraph 13 alleges that, on or about August 25, Respondent granted its employeee a morning and afternoon break in order to discourage support for the Union. It is undisputed that prior to the advent of the Union, Respondent's employees were not authorized to take morning and afternoon breaks.[15] A few days before the election, Korman told Berta to instruct the kitchen employees to take a 10-minute break each morning and afternoon.[16] In the absence of evidence demonstrating that the announcement of the granting of the breaks was governed by factors other than the pending of the election, the Board will regard interference with employee freedom of choice as the motivating factor. See, e.g., *The Baltimore Catering Company*, 148 NLRB 970, 973 (1964). Respondent has failed to show the announcement was governed by factors other than the pending election. Accordingly, I find that the timing of the announcement was calculated to discourage support for the Union in violation of Section 8(a)(1) and interfered with the election.

E. *The Immigration Raid*

Respondent admits that its former attorney, Arbiter, made arrangements for INS to conduct a survey of Respondent's employees, and that the raid occurred on August 29, 2 days before the scheduled representation election.[17] The evidence establishes that while Korman did not know, she suspected that most of her employees were illegal aliens and would therefore be deported by INS. As noted earlier, Korman apparently had second thoughts about the pending INS survey and, on August 28, told Berta that she had received an anonymous call that INS would be in the area the following day, and that Berta should call the other employees and tell them not to come to work. Berta, Gloria Lopez, and Yolanda Martinez all went to the union hall that evening, and Rosen expressed the opinion that the INS would not conduct a survey, but that representatives of another government agency were coming to check records. Thereafter, Berta called the employees she had not already contacted, and told them of Korman's message and Rosen's reaction to it. On the following morning, August 29, all but two of the kitchen employees reported for work, the INS conducted a raid, or survey, about 7:30

[15] There is evidence, however, that they took an unauthorized break in the mornings but that Korman was not aware of the fact.

[16] The instruction had apparently originated with Respondent's then-attorney.

[17] It is clear that Arbiter was acting as Respondent's agent and that the idea of requesting an INS raid originated with him.

a.m., and the 10 illegal aliens in the group were voluntarily deported.

Respondent contends that the INS raid, resulting in the deportation of the 10 illegal aliens, should not be the basis of a bargaining order since Korman had expressly directed the employees not to report for work on the day of the raid; that the complicity of the Union and the employees insured the success of the raid; consequently, to impose a bargaining order in these circumstances would enable the Union and the employees to benefit by their own wrongdoing. Even if Respondent's role in the INS raid is found to have violated Section 8(a)(3), it is argued, the policies and purposes of the Act have been effectuated by the reinstatement of the employees in December, and further relief in the form of backpay should be denied.

I find no merit in Respondent's argument. Minnillo testified, without contradiction, that Arbiter told her to terminate the 10 illegal aliens picked up and deported by INS, and also Lubia Gutierrez and Maria Zepeda, neither of whom had reported for work the morning of the raid. Thus, those illegal aliens who reported for work were doomed, at Arbiter's direction, to be terminated for having reported for work, and those employees who heeded Korman's instruction not to report for work were ordered by Arbiter to be dealt with in the same manner. It is clear from the record that the termination of all 12 employees was motivated by their collective engagement in union and/or protected concerted activities, which resulted in the filing of the representation petition, and Respondent's desire to affect the results of the Board election scheduled for August 31. In light of Minnillo's testimony, I reject Respondent's contention that Lubia Gutierrez and Maria Zepeda were terminated for not reporting for work. I find they were terminated because Respondent believed all the Mexican nationals had engaged in organizing the Union and were responsible for the filing of the petition. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act by constructively discharging and by discharging Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Eva Rodriguez, Refugio Betancourt, Lubia Gutierrez, and Maria Zepeda because of their engagement in union and/or protected concerted activity as alleged in paragraphs 10 and 11 of the consolidated complaint, and in order to interfere with and affect the results of the August 31 Board election.

F. *Berta's Termination*

Paragraph 12 of the consolidated complaint alleges Berta was unlawfully discharged on August 29, the day of the INS raid. The General Counsel contends that Berta was terminated because Korman suspected she supported the Union. Respondent claims she was terminated because of threats she made against Korman on the day of the raid.

The record shows that when the INS agents raided Respondent's premises on August 29, Berta was taken outside the premises along with the other employees, but was released after she produced evidence that satisfied the INS agents that her status did not call for deportation. There is a bit of confusion on the part of both Korman and Berta regarding the sequence of events following Berta's return to the kitchen. I conclude on the basis of the testimony of Gloria Lopez, Minnillo, Raquel Gonzalez, and Eva Sanchez, all of whom were present and testified to events and statements made after Berta returned to the kitchen, in addition to the testimony of Korman and Berta, that events occurred substantially as set forth hereafter. After the others had been taken outside by the INS agents and it was apparent they were going to be taken away by the INS, they gave Berta and Gloria Lopez the keys to their cars.[18] Berta and Gloria returned to the plant where the two proceeded to call the relatives of those in INS custody, Berta using the phone in the office and Gloria the public phone in the kitchen. After completing the calls, Berta and Gloria, apparently with Korman's permission, left the plant and were observed by Minnillo getting into a Mercedes-Benz with Rosen. While Minnillo did not know who Rosen was, she speculated he was connected with the Union and at some point told Korman. Gloria and Berta told Rosen what happened. Rosen drove to a location several blocks away where he used a telephone. The two women apparently became tired of waiting for Rosen and proceeded to walk back to the plant where several of the employees who had not been taken away by INS were working. According to Gloria Lopez, when they entered the plant to go to work, Berta became irritated, got "very mad" and yelled insulting remarks to Korman and the others in English and Spanish. Korman's testimony was as follows:

> Berta yelled "I will get you. I will follow you. We will never let you forget this." And she did it in a screaming, yelling manner with a raised hand. She used both the terms 'I' and 'we'. I didn't know if she was referring to her husband Louis Ujueta or to gangs or to what, and I didn't ask. She was screaming so loud, at the top of her lungs. . . . She yelled at me for a period of 4 minutes, and then turned around and yelled at the employees, and then yelled at one employee in particular, in a very heated debate, screaming.

Respondent contends the ahove conduct led to her discharge which was for cause.

Raquel Gonzalez, who understands but speaks little English, is no longer employed by Respondent. She testified that Berta told Korman, "I hate you" and "you are going to regret this that you did." Later, Berta loudly stated in Spanish to the employees that, "whoever it was [that called INS] is going to regret it. . . . Curse the person who did it." Berta admitted she was angry and raised her voice and had angry words with Korman in front of the other employees. While she testified that Gloria Lopez, Eva Sanchez, Korman, Raquel Gonzalez, Eva De La Cruz, and Louis Olivas were present during the conversation, her version lacks corroboration and is

[18] During the raid, Gloria had become emotionally upset, cried and threw a pastry bag to the floor. Korman tried to console her.

not credited. Her initial version was that after returning to the kitchen she said, "Does everybody feel go[od] about it, and Nadine said to me, don't threaten me, just leave. And I left, and I went to make some phone calls and Gloria Lopez left with me." That version was followed by "I told her that she knew about it—if she—that she had called Immigration, and that if she didn't, that she knew about it, and she did that because of the Union and all, but that it wouldn't help her because we would be back to vote on Friday. . . ." Korman's response, according to Berta, was "not to threaten her, and just to leave."[19] Even if some significance is attached to the fact that Berta was observed getting into Rosen's car shortly prior to her discharge, Gloria Lopez was observed getting into the car too. Berta's role as the principal union protagonist was not known to Respondent at this time. Why, then, was Berta terminated and Gloria Lopez not? The answer lies in Berta's conduct upon her return to the plant—the threats she made towards Korman.

Upon the foregoing evidence, I find that Berta's termination was not in violation of Section 8(a)(3) or (1) for the reasons that she was a supervisor within the meaning of Section 2(11), and that her termination was for cause. Accordingly, I recommend dismissal of paragraph 12 of the consolidated complaint.

G. *Betancourt's Reinstatement and Subsequent Discharge*

Paragraph 14(a) alleges that, on or about December 21, Betancourt was recalled to a position different from his former position of employment, and paragraph 14(b) alleges he was discharged on or about January 2, 1980, and Respondent has since failed and refused to reinstate him to his former position of employment. The General Counsel contends that prior to August 29, Betancourt spent half of each day making (measuring and whipping) creams and the rest of each day doing a variety of other tasks. She contends that when he returned in December, he was not assigned to do the creammaking since another employee made creams, and instead spent all of his time on a variety of other tasks. When, on his last day, he was assigned to creammaking, he worked only half a day before he was fired, allegedly for making more cream than was needed. The General Counsel contends that Betancourt was initially given jobs which required him to use different skills and was not adequately informed of the changes in Respondent's rules about excess cream when he was finally assigned to creammaking. Therefore, his reinstatement was not proper, and Respondent's liability to him did not terminate when he returned to work in December. Respondent contends that when Betancourt returned to work in December, he performed substantially the same duties he had performed before; that he was slow and not a good employee, a fact known to everyone but Korman, who first observed his work after the December reinstatement; that Respondent's motive in terminating him again was not bad, but that he was in fact terminated for slowness and incompetence.

There is no contention that Betancourt was reinstated at a lower rate of pay or that he had no training or experience in doing the tasks he performed upon reinstatement at the end of December. To the contrary, it appears he resumed doing much the same as he had done before. In fact, there seems to have been no specific job which was performed by any particular employee in the kitchen. All of the employees appear to have been capable of performing, and did perform, all of the kitchen tasks, including creammaking. While some testimony indicates that Betancourt's "principal job" prior to the August 29 termination was creammaking, the record makes it clear he also did other jobs in the kitchen, including grinding cookies, breaking and separating eggs, melting chocolate, washing and drying molds, pots, and dishes, helping bring in merchandise, helping clean up the kitchen, throwing out the trash, and otherwise helping the kitchen employees. The record is also clear that Betancourt did not make the cream all of the time. Berta testified that "it was my week to go in early to whip the cream" the week of August 29. Gloria Lopez, whom I credit, testified that Betancourt was not too good a worker, that he would get behind in the work, and that the other employees would have to help him measure and beat the creams because he was so slow. Miream Gutierrez, no longer employed by Respondent, testified that she had overheard Berta tell some of the other kitchen employees that Betancourt was "very slow" and "very dumb." Korman testified that the first she realized Betancourt was such a slow worker was when he returned in December, and she asked Gloria Lopez to put him on the cream machine.[20] Lopez declined to do so because he was too slow.[21] Korman testified that she later asked Eva Sanchez, Lopez' assistant, to put him on the cream machine and that Sanchez also responded that he was too slow. She testified that on the basis of her December observation, she found Betancourt to be one of the slowest working employees she had ever seen, regardless of age or sex, and that during the 3 days she observed him, she asked him a number of times if he felt alright. She testified she made suggestions for speeding up his dishwashing and drying and how to perform other tasks more efficiently, and on December 28 commenced making notes about his work. On December 28, the grinding machine broke while he was operating it. On December 29, she "spoke to him repeatedly about his slowness." On December 31, she informed him that his work was unsatisfactory, that he was too slow "on dishes, on both washing and drying, too slow on crumbs and putting on labels. I said that in one week I would speak to him again and, if no significant improvement, I would have to fire him." On January 2, she made another note regarding several work deficiencies, and terminated him because his work was "totally incompe-

[19] While Berta and Louis Ujueta denied her statements, Eva Sanchez testified to other threats against Respondent's premises and Korman's car, made that evening.

[20] The evidence convinces me that Korman spent very little time in the kitchen prior to August 29.

[21] Lopez was the kitchen supervisor the first day Betancourt returned in December; however, she was away after that because of sickness, during which time Eva Sanchez was in charge of the kitchen workers.

tent." Betancourt acknowledged that on January 2 he had been assigned to do the creams and that he had made an extra batch for decorating and an extra batch for filling. He informed Sanchez, who was in charge of the kitchen in Lopez' absence, and was later called to the office by Korman and terminated. It is apparent from the record that making creams requires no special skill, that everyone in the kitchen did it, including Berta, who testified she did it the final week in August. It is also clear from the record that Betancourt was a personal friend of the Ujuetas, lived in the same building, and that they were instrumental in his employment. It is also apparent that Betancourt was a slow and inefficient employee and that it was undoubtedly through his friendship with the Ujuetas and the fact Berta was the supervisor in the kitchen, that he was able to retain his job as long as he did. In sum, I find no merit to the contention of the General Counsel that he was not reemployed or recalled to his former position of employment, which was as a helper in the kitchen, or that he was unlawfully discharged on January 2, 1980. I conclude on the basis of the foregoing evidence, that he was terminated on the latter date because he was not a satisfactory employee, and that but for his friendship with the Ujuetas, he would have been terminated earlier. Accordingly, I recommend dismissal of paragraph 14.

H. *Alleged Unilateral Changes and Discharges of Arauz, Badillo, and Aguirre*

Paragraph 20 of the consolidated complaint alleges several unilateral changes made by Respondent:

(a) Alleges that in November, Respondent changed the length of the morning and afternoon breaks from 10 to 15 minutes each.

(b) Alleges that in the latter part of December, Respondent arranged for Blue Cross medical insurance effective January 1, 1980.

(c) Alleges the institution of the following workrules: (1) Any employee burning chocolate would be fired; (2) failure to notify Respondent 1 hour before starting time that an employee would be absent would result in termination; and (3) employees were not to leave money in the dressing room.

The General Counsel seeks a bargaining order and argues that if one is warranted, the above changes were unilateral and in violation of Respondent's bargaining obligation. It is also contended that the discharges of Arauz, Aguirre, and Badillo were unlawful since the terminations were for violating the unilaterally established rule calling for discharge for failure to notify Respondent of an absence 1 hour before starting time. Contending there were additional reasons for the terminations of Arauz and Badillo, Respondent admits that failing to call in or report for work played a role in the termination of all three employees. Respondent points out that none of the three had any contact or relationship to activity surrounding the union organizing campaign, nor did they testify at the hearing. It is argued that the record is replete with testimony concerning employees calling Berta if they were going to be late or unable to work, thus there was a practice of calling in, and it is common sense that an employee inform an employer if he is going to be late or not work at all. It is argued that "employees are not free to choose the hours or days they will work and cavalierly disregard their responsibilities and obligations not only to the employer, but to fellow employees who, without notice, are obligated to assume the work which otherwise is left undone. . . ." Respondent argues that as long as the motivation is not unlawful, the discharges cannot be unlawful and, in any event, reinstatement is not appropriate and does not effectuate the policies of the Act.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Court upheld the Board's bargaining order remedy where the only unfair labor practice shown was the threat of plant closure. Here, the Respondent retaliated against the protected concerted activity of its employees by discharging 12 employees out of a unit of 17 employees, 10 of whom had signed valid authorization cards.[22] Thus, it is seen that 59 percent of the employees in the unit were unlawfully discharged. In *Ludwig Fish & Produce, Inc.*, 220 NLRB 1086, 1087 (1975), the Board noted:

> The pervasive effect of such egregious violations cannot be gainsaid. For whether the unit is large or small the discriminatory discharge of 40 percent of the bargaining unit employees demonstrates most convincingly that the Respondent has resorted to its ultimate weapon in thwarting the employees' exercise of protected statutory rights.

The nature and pervasiveness of Respondent's unfair labor practices, as described above, have made the holding of a fair election impossible, and therefore, since the Union represented a majority of Respondent's employees on and after April 13, a bargaining order is necessary to remedy Respondent's unfair labor practices. As Respondent embarked on a clear course of unlawful conduct on or about August 22, when it requested that INS conduct a raid, I conclude that a bargaining order effective that date will reestablish the conditions as they existed before Respondent embarked on an unlawful course and placed the Union in a disadvantaged position. *Gissel Packing Co., Inc., supra; Beasley Energy, Inc., d/b/a Peaker Run Coal Company*, 228 NLRB 93 (1977); *Ludwig Fish and Produce, Inc., supra; Trading Port, Inc.*, 219 NLRB 298 (1975).

With respect to the change in the length of the morning and afternoon breaks from 10 to 15 minutes each, Respondent admits that the Union was not notified, and Korman testified that the reason for making the change was because the employees were completing their work on time. Not every unilateral change in work rules constitutes a breach of the bargaining obligation. In *Peerless Food Products, Inc.*, 236 NLRB 161 (1978), the Board stated: "The change unilaterally imposed must, initially,

[22] The unit employees on August 29, the date of the mass discharges, were Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Gloria Lopez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Maria Zepeda, all of whom had signed valid authorization cards, Lubia Gutierrez, Eva Rodriguez, Eva Sanchez, Louis Olivas, Adeline De La Cruz, Raquel Gonzalez, the last three having been found by the Regional Director to have been eligible voters on August 31.

amount to 'a material, substantial, and a significant' one." I conclude and find that the change here was not material, substantial, or signicant, and therefore recommend dismissal of paragraph 20(a).

The record shows that in 1978, Korman offered all employees a group health insurance plan which the kitchen employees turned down because it did not include maternity benefits. In October, Korman reconsidered the idea and on January 1, 1980, a Blue Cross group plan was put into effect. Admittedly, there was no prior notice to the Union. The implementation of hospitalization or health insurance benefits, clearly mandatory subjects of bargaining, cannot lawfully be granted without first giving the Union an opportunity to bargain. I conclude, therefore, that Respondent violated its statutory duty to bargain with the Union over the implementation of the plan as alleged in paragraph 20(b).

On December 29, Korman had read to employees and posted on the bulletin board the following notices directed to all employees:

> To: All Employees
>
> From: La Mousse
>
> On Decemer 28, 1979, three pots of chocolate were left unattended on the stove. The chocolate and all three pots was burned and had to be thrown out. Also on December 28, 1979, two large industrial brooms were broken beyond repair. Therefore, this is to notify all employees that any employee found leaving cooking materials unattended, including material in the Hobart mixers, will be subject to immediate discharge.
>
> If, for any reason, an employee is unable to come to work, he or she is to call in within one hour from the start of the work day. If, for any reason, an employee is going to be late work, he or she is to call in within one hour from the start of the work day. Failure to comply will subject the employee to immediate discharge.
>
> On December 29, 1979, this letter was read both in English and in Spanish to all employees present. Further, this notice was posted in English and in Spanish in our bulletin room on December 29, 1979. Those employees not present on December 29, 1979, will be read this letter in English and in Spanish upon their return.
>
> To: All Employees
>
> From: La Mousse
>
> At 6:00 A.M. on December 29, 1979, an employee reported to me the loss of money from her purse, which was located in the dressing room on Debember 28, 1979.
>
> This letter is to notify all employees that at no time are they to leave anything of value in their purses or in the dressing room. All money, jewelry, credit cards, and any other valuable property are to be kept on their person at all times.
>
> Any employee found disturbing or touching another person's personal property will be immediately discharged.
>
> On December 29, 1979, this letter was read both in English and in Spanish to all employees present. Further, this notice was posted in English and in Spanish in our bulletin room on December 29, 1979. Those employees not present on December 29, 1979, will be read this letter in English and in Spanish upon their return.

The General Counsel contends that since the written rules are stricter than the prior practice, their institution without consulting with the Union constitutes an unlawful unilateral change. Respondent contends that the rules merely reduce to writing the Employer's past practice.

While there was no written rule prior to the issuance of the December 29 memo to the effect that anyone found leaving cooking materials unattended would be subject to discharge, Lilia Garcia testified that there was a verbal rule "to take care of the chocolate, make sure it did not burn." The record further shows that burnt chocolate was reported to Berta, and that it had to be thrown away. There is no evidence that anyone has ever been discharged for burning chocolate or leaving cooking materials unattended. Korman testified that the reason for the posting of the rule was that on December 28 three pots of chocolate had been left unattended and as a consequence burned at one time, which had never happened before, and two large industrial brooms had been broken beyond repair. No brooms had ever been broken before.

With respect to the memo advising employees they were subject to discharge for failure to call in within an hour from the start of the workday if the employee was going to be absent or late, it is abundantly clear, and Berta so testified, that employees were aware they were to call in, and that "they always did." Korman testified "they always would call in within an hour, or a half hour. They just did. Or so Berta told me. Berta received the phone calls." The record shows that employees had in fact been terminated for failure to call in.

The purpose for the December 29 notice which the complaint characterizes as a rule that "employees were not to leave money in the dressing room," is spelled out in the first paragraph; i.e., money had been stolen from an employee's purse which had been left in the dressing room. Korman testified that there had in fact been two thefts, one on December 28 and one on December 29, Eva Sanchez had lost $170 cash and Esperanza Tirado had lost $40 cash. The record shows prior theft of money, and that in one instance the suspected employee quit her employment right away. The General Counsel's distinction between the prior practice and the notice in the memo is, "the written rule stated that anyone touching or disturbing another's property would be terminated whereas prior practice was that anyone found stealing would be immediately terminated."

I conclude and find that Respondent has demonstrated justifying circumstances for issuing the December 29 notices. There is no indication that they were discriminatorily motivated as retaliation against the employees for any protected activities, nor that they in any way undercut the Union's representative status. Absent discrimination, an employer is free to choose more efficient and de-

pendable methods for enforcing its workplace rules. *Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978). Moreover, the publication of the rules does not represent a "material, substantial, and significant change" constituting a breach of the bargaining obligation. *Peerless Food Products, Inc., supra.*

Having found that the publication of the December 29 memorandum informing employees that they were subject to discharge for failure to call in within an hour from the start of the workday if they were going to be late or absent, did not constitute an unlawful unilateral change, it follows that the discharges of Arauz, Aguirre, and Badillo for that reason did not violate Section 8(a)(1) of he Act as contended by the General Counsel. The circumstances surrounding their terminations, however, are discussed herein.

Badillo, who also used the name Mario Garcia, Aguirre, nor Arauz testified. Thus, Korman's testimony regarding their discharges is not refuted. The record shows that Badillo was a slow worker, a fact discussed with him on several occasions. On December 28, he received his "third and final warning before termination," because he was so slow. On December 29 Badillo called in that he would not be in that day because of car trouble on the freeway but that he would be in Monday, December 31. He failed to either show up or call on December 31.[23] After missing approximately 5 days of work, Badillo appeared one morning at 11 o'clock Korman testified she thought he had quit. She asked the reason he had not appeared and he informed her that he had been "in jail and something about a car crash." She terminated him for failure to call in. On April 1, 1980, the California Employment Development Department issued a decision finding:

> You were discharged for absence from work. You were unable to report to work because you were incarcerated; however, you did not notify your employer of your situation, although you could have done so. Therefore, it must be held that you[r] discharge was for actions detrimental to the employer's interest.

Korman characterized Aguirre as an "excellent worker." The record shows that on December 28 Aguirre overslept and failed to call in or show up until 2:30 p.m. when he came in to pick up his check. On December 29, he again overslept and did not come in until 10 a.m. Korman accepted as an excuse for failing to call in the fact that Gloria Lopez had given Aguirre the wrong telephone number to call. On Monday, December 31, Aguirre again failed to call or show up for work. After he failed to call in or report for work on January 2, Korman terminated him.

Korman testified that Arauz was a slow worker and a slow learner. Notes placed in her employee file show that on October 18, her slow performance was discussed with her; that on December 3, she had shown improvement, but "she seems to be a slow learner"; that she was absent on December 19; that on December 27, she did not have a hair net;[24] that on December 26 she received three personal telephone calls, and on December 27 one personal call, all received, according to Korman, during working hours which meant a loss of time for two individuals, Gloria Lopez, who went to answer the phone, and the time Arauz spent in talking. Near the end of December, Arauz asked for a day off, which was granted. The following day she neither called in nor showed up for work. The next day, when she came in to work she reported as the reason for not calling in the previous day that she had run out of gas the day before. She was asked and acknowledged that she knew about the requirement that employees call in when they were going to be late or absent from work. She was then terminated.

Contrary to the General Counsel, I find all three employees were terminated for cause and recommend dismissal of paragraph 21.

V. THE CHALLENGES

Having found that Berta Ujueta was a supervisor within the meaning of Section 2(11) of the Act, I recommend that the challenge to her ballot be sustained. Having found that Ofelia Vasquez, Ana Veronica Gutierrez, Ana Elsa Rodriguez, and Arcelia Rodriguez were unlawfully discharged on August 29, I recommend the challenges to their ballots be overruled.

VI. PETITIONER'S OBJECTIONS

Objection 3 alleges that prior to the election, Respondent granted benefits to the employees in order to impinge upon their freedom of choice and to encourage them to vote against the Union. Having found that Respondent's instruction on or about August 25 to the kitchen employees to take a 10-minute break each morning and afternoon was calculated to discourage support for the Union and interfered with the election, I recommend that Objection 3 be sustained.

Objection 4 alleges that Respondent interrogated employees and conducted surveillance of its employees to determine the extent of their support for the Union. Having found that in mid-August Fierro and Ramirez unlawfully interrogated employees about their union sympathies and desires, I recommend that Objection 4 be sustained.[25]

Objection 5 alleges the unlawful discharge of Berta and 11 employees in order to discourage membership in the Union and to interfere with concerted, protected activities. In light of my findings regarding the unlawful discharge of the 12 employees as alleged in paragraphs 11(a) and (b), I recommend that Objection 5 be sustained.

Objection 6 alleges that Respondent failed to post the official board notices in Spanish and English in conspicuous locations and for the time period required. The General Counsel's witnesses who testified on this subject, claimed that only the English version of the Board's

[23] The Christmas-New Year Holidays are Respondent's busiest time of the year.

[24] Apparently employees working with food products are required by law to wear hairnets.

[25] No showing has been made, however, that Respondent engaged in surveillance as alleged.

notice of election was posted. Korman testified that both English and Spanish versions of the notice were posted in three locations, and that they remained posted until after the election. The Board agent who conducted the election did not contend there was any irregularity with respect to the posting. Minnillo, who is no longer employed by Respondent, testified that two sets of notices (Spanish and English) were posted by Korman in the kitchen and by the timeclock, both locations visible from her desk. Gloria Lopez and Eva Sanchez testified they only read the center portion of the notice, which was in Spanish. Raquel Gonzalez thought a Spanish notice was posted, but was not sure if there was an English version. Respondent's witnesses testified that only the notice in English was posted, but that the center portion was in Spanish. It is clear from an examination of both the English and Spanish notices, that the center portion of both is identical, the left side in English, the right side in Spanish, both setting forth the unit, inclusions and exclusions, and the time and place of the election. Below each, in both Spanish and English, is a sample copy of the ballot. As noted earlier, I am convinced that the General Counsel's witnesses tailored their testimony regarding the notices to insure a new election. The fact remains, however, that five of those who had been deported to Mexico on August 29, made it back to vote at the August 31 election, which convinces me they were not unaware of the legend on the election notices. In light of my credibility findings, I recommend that Objection 6 be overruled.

On the basis of the foregoing facts, I find that the election should be set aside, and I so recommend. I conclude further, as more fully described above, that Respondent's unfair labor practices are pervasive so as to prevent the holding of a free election and that, consequently, a bargaining order based on a card count is warranted. Thus, I recommend to the Board that the petition in Case 31-RC-4550 be dismissed and that all prior proceedings held thereunder be vacated in view of the remedy requiring recognition and bargaining based on a card majority.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By requesting the Immigration and Naturalization Service to conduct a raid to investigate which of Respondent's employees were undocumented aliens, because of their support for the Union, Respondent caused the arrest and deportation of Refugio Betancourt, Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Eva Rodriguez, Ofelia Vasquez, and Elizabeth Villanueva, thereby constructively discharging them in violation of Section 8(a)(3) and (1) of the Act.

4. By discharging Maria Zepeda and Lubia Gutierrez because Respondent believed they had engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By granting employees a morning and afternoon break in order to discourage support for the Union, Respondent violated Section 8(a)(1) of the Act.

6. By interrogating employees regarding their union activities, desires and sympathies; by soliciting their grievances, and by promising to grant them benefits in order to discourage their suppport for the Union, Respondent violated Section 8(a)(1) of the Act.

7. By unilaterally granting employees medical insurance coverage at a time when the Union represented a majority of Respondent's employees in an appropriate collective-bargaining unit, Respondent violated Section 8(a)(1) of the Act.

8. All full and regular part-time employees employed by Respondent at its location at 11150 La Grange Avenue, Los Angeles, California; excluding all delivery employees, office clerical employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

9. On or about April 13, 1979, and at all times thereafter, the Union represented a majority of the employees in the above-appropriate unit, and has been the exclusive representative of all said employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

10. Respondent's unfair labor practices were so pervasive that they are disruptive of the election process, precluding a fair election and warranting an order to bargain.

11. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

12. Respondent has not committed any other unfair labor practices alleged in the consolidated complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. To the extent that Respondent has not already done so, I shall recommend that Respondent be required to offer Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Eva Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Maria Zepeda, and Lubia Gutierrez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them, together with Refugio Betancourt, whole for any loss of earnings they may have suffered by reason of Respondent's discrimination against them, by payment of a sum of money equal to that which they normally would have earned as wages from the date of their discharge on August 29, 1979, to the date of said offer of reinstatement, less their respective net earnings during such period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289

(1950), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[26]

It having been found that the nature and pervasiveness of Respondent's unfair labor practices have made the holding of a fair election impossible, I shall recommend that Respondent cease and desist from engaging in such unlawful conduct and bargain with the employees designated collective-bargaining representative, Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO.

Because of the character of the unfair labor practices found herein, I shall recommend that Respondent cease and desist from in any manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

It is also recommended that Respondent make available to the Board, upon request, all payroll and other records to facilitate checking the amount of backpay due.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[27]

The Respondent, La Mousse, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or causing the constructive discharge of employees by requesting the Immigration and Naturalization Service to investigate which employees are undocumented aliens, because of their support for Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, or any other Union.

(b) Dicharging employees because we believe they engaged in union or protected concerted activities.

(c) Granting employees benefits in order to discourage support for the Union.

(d) Interrogating employees regarding their union activities, desires, and sympathies.

(e) Soliciting grievances from employees, or promising to grant them benefits in order to discourage their support for the Union.

(f) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of all the employees in the above-described unit.

(g) Unilaterally granting benefits to employees at a time when the Union represents a majority of Respondent's employees in an appropriate collective-bargaining unit.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize and bargain with Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, as the exclusive collective-bargaining representative of all the employees in the aforesaid appropriate unit and, if an agreement is reached, embody such agreement in a written, signed agreement.

(b) To the extent that Respondent has not already done so, Respondent shall offer Lilia Garcia, Ana Veronica Gutierrez, Yolanda Martinez, Rosenda Ramirez, Ana Elsa Reyes Rodriguez, Arcelia Rodriguez, Eva Rodriguez, Ofelia Vasquez, Elizabeth Villanueva, Maria Zepeda, and Lubia Gutierrez, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(c) Make whole each of the employees as set forth above, together with Refugio Betancourt, for any loss of pay each may have suffered by reason of Respondent's unlawful discrimination, for the period commencing August 29, 1979, to the date of reinstatement or offer of reinstatement, in the manner set forth in the section entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Los Angeles plant, copies of the attached notice marked "Appendix."[28] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein, specifically paragraphs 12, 14(a) and (b), 16, 18(d), (e), (f), and (g), 19(a), (b), and (c), 20(a), (c), and (d), and 21.

[26] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[27] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[28] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

We will not discharge or cause the constructive discharge of employees by requesting the Immigra-

tion and Naturalization Service to investigate which of our employees are undocumented aliens, because of their support for Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, or any other union.

WE WILL NOT discharge employees because we believe they have engaged in union or protected concerted activities.

WE WILL NOT grant benefits to employees in order to discourage their support for the Union.

WE WILL NOT interrogate employees regarding their union activities, desires, or sympathies.

WE WILL NOT solicit grievances from employees or promise to grant them benefits in order to discourage their support for the Union.

WE WILL NOT unilaterally grant benefits to employees at a time when the Union represents a majority of our employees in an appropriate collective-bargaining unit, without first bargaining thereon with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, as the exclusive collective-bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an agreement is reached, embody such agreement in a written signed agreement. The bargaining unit is:

All full and regular part-time production employees employed by us at our location at 11150 La Grange Avenue, Los Angeles, California, excluding all delivery employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer each of the employees named below, to the extent that we have not already done so, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges previously enjoyed, and make whole each of said employees, together with Refugio Betancourt, for any loss of pay each may have suffered by reason of our discrimination against each of them, for the period commencing August 29, 1979, to the date of reinstatement or offer of reinstatement, with interest:

Lilia Garcia	Ana Elsa Reyes Rodriguez
Ana Veronica Gutierrez	Arcelia Rodriguez
Lubia Gutierrez	Eva Rodriguez
Yolanda Martinez	Ofelia Vasquez
Rosenda Ramirez	Elizabeth Villanueva

Maria Zepeda

All our employees are free to become or remain, members of Bakery, Confectionery & Tobacco Workers International Union, Local 453, AFL-CIO, or any other labor organization.

LA MOUSSE, INC.